In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, a Municipal Corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State, *Respondents.*

BRIEF OF RESPONDENT DIRECTORS AND STATE OF WASHINGTON

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BRIEF OF RESPONDENT DIRECTORS AND STATE OF WASHINGTON

OPINION BELOW

The opinion of the supreme court of the State of Washington is reported at 49 Wn. (2d) 781, appears in the record pp. 268-313 and 369-371, and is printed as Appendix A to the petition for certiorari in this case.

JURISDICTION

The jurisdiction of this court rests upon 28 U. S. C. § 1257 (3). Certiorari was granted on December 9, 1957 (R. 383).

STATUTE INVOLVED

The statute attempted to be drawn in question is § 21 of the Federal Power Act, 41 Stat. 1063, *et seq.*, 16 U. S. C. § 814.

QUESTION PRESENTED

The sole question presented is stated by the supreme court of the State of Washington on page 791 of the decision as follows:

> "Does a municipal corporation, created by the state as a subordinate unit, have the power to condemn state lands held in a governmental capacity and previously dedicated to a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?" (R. 277.)

The question was again specifically stated by the state supreme court on page 798 of the decision as follows:

> "* * * can the city of Tacoma receive the power and capacity to condemn state-owned lands previously dedicated to a public use, from the license issued to it by the Federal power commission in the absence of such power and capacity under state statutes?" (R. 284-285.)

STATEMENT

The City of Tacoma, Washington, by ordinance authorized construction of the public utility involved in this case under the authority contained in the Revised Code of Washington cited as RCW 80.40.010, which specifically allowed the condemnation of private property only for such a purpose.

Under the settled law of the state this did not grant the city authority to condemn property owned by the State of Washington and devoted by it to a public use, such as highways, and the supreme court of the State of Washington so held in this case. (R. 284, R. 371.)

The construction of the project proposed by the City of Tacoma as planned required the flooding of state property, including state highways and a fish hatchery which had been owned and operated by the State of Washington since 1941. (R. 229, R. 175.)

Provision is made by state law for the replacement of state-owned property which it would be necessary to acquire for such a facility, where that would be possible, and the subsequent acquisition of the property for the project when no longer necessary for governmental purposes.

In the case of highways, for instance, that authority is contained in RCW 90.28.010 and .020; in the case of the fish hatchery, in RCW 77.12.210. Such statutory methods are exclusive. *State ex rel.*

Polson Logging Co. v. Superior Court, 11 Wn. (2d) 545, 554.

Tacoma, in compliance with state procedure, applied for and received from the department of conservation and development of the State of Washington a permit to construct the dam near Mayfield and a preliminary permit for the construction of the Mossyrock dam. The director did not issue a final permit for the Mossyrock dam, and the city filed a mandamus action directly in the supreme court of the State of Washington to compel the issuance of the permit. *State ex rel. Tacoma v. Rogers*, 32 Wn. (2d) 729.

The application was denied on the 10th day of March, 1949, because an act of the Washington legislature prohibiting the construction of a dam over 25 feet high in a fish sanctuary area would go into effect before the dam could be constructed. *State ex rel. Tacoma v. Rogers*, 32 Wn. (2d) 729, 732.

When Tacoma received its license from the federal power commission the instant action was commenced to test its capacity under state law. In this action the supreme court of the state struck down the fish sanctuary act just referred to, together with all other statutes of the state which would "enable state officials to exercise a veto over said project," leaving only the precise question of the capacity of the City of Tacoma to injure its creator by the taking of property devoted to a public use without being authorized by the state so to do.

The license granted by the federal power commission was reviewed and sustained by the United States court of appeals for the ninth circuit. *State of Washington Department of Game v. Federal Power Commission* (1953), 207 F. (2d) 391, cert. den. 347 U. S. 936.

That court, in declining to interfere with the license, said (p. 396):

> "* * * However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. * * *"

In order to test its capacity "to initiate and act" under the license, Tacoma filed the instant action in a state court, raising questions of state law.

The action was one for declaratory judgment (RCW 7.24.010, *et seq.*) and to test the validity of a necessary bond issue (RCW 7.25.010 and .020). The complaint alleged that the action was brought "particularly for the purpose of determining whether or not Chapter 9, Laws of 1949 [fish sanctuary act] * * * or any other law of the State of Washington, is a bar to such constructions and to the issuance and sale of bonds by plaintiff for such purposes."

Defendant, Taxpayers of Tacoma, demurred (R. 53). The demurrer was sustained (R. 59). On the appeal of the city, the supreme court of the State of Washington reversed (R. 92). *Tacoma v. Taxpayers*, 43 Wn. (2d) 468, 494. In accordance with this opinion rendered on October 14, 1953, the case

was returned to the trial court for further proceedings and trial on the merits.

Before the case was brought to trial Tacoma filed in the United States district court for the western district of Washington a condemnation action in which the State of Washington was named as a party defendant. The state moved to dismiss. That motion was granted by the Honorable George H. Boldt, judge, on June 15, 1955 (R. 176). In his ruling, Judge Boldt said (R. 177):

> "The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by the legislature of that sovereign state. Accordingly, Section 814 of the Federal Power Act (Title 16 U. S. C. A.), which grants the right of eminent domain in district courts of the United States to licensees of the Federal Power Commission, does not remove or affect the limitations on the condemnation powers of Washington cities."

The city then voluntarily dismissed this action (R. 273).

On June 21, 1955, and prior to the trial of the instant action in which the city sought to determine its rights, it authorized the sale of bonds for the project involved in this case, and on June 22, 1955, awarded contracts for the construction of Mayfield dam. An ordinance authorizing the condemnation of the state fish hatchery was also passed (R. 271).

These steps on the part of Tacoma necessitated the framing of new issues, and on June 24, 1955, a motion for restraining order *pendente lite* was filed

(R. 123). A temporary order was granted so that the *status quo* would be preserved (R. 129).

On August 16, 1955, the Washington state game commission, acting under the authority contained in RCW 77.12.210, considered the question of whether or not the fish hatchery could be certified for sale as "not necessary for the purposes for which it was acquired."

The game commission found that the operation of the fish hatchery was necessary, that no alternate site could be found, and that it was completely irreplaceable (R. 175).

Before the opinion of the state supreme court in the instant case was filed, Tacoma obtained introduction in the legislature of the State of Washington of a bill, known originally as Senate Bill 264, which "would authorize the City to acquire the Mossyrock Fish Hatchery through condemnation proceedings, if negotiation for purchase within 60 days is unsuccessful." (R. 341.)

A copy of this bill, together with a portion of the legislative record showing legislative action and ultimate defeat of Substitute Senate Bill 264 in the House on March 12, 1957 (R. 368), is attached hereto as Appendix A.

After pointing out that the question of the legal capacity of the City of Tacoma to act under the license issued by the federal power commission was specifically excluded from consideration by the court of appeals for the ninth circuit in *State of Washing-*

ton Department of Game v. Federal Power Commission (1953), 207 F. (2d) 391, the state supreme court said:

> "Hence, this case is not *res judicata* against the state of Washington. As we have heretofore pointed out, the city does not have the capacity to act under the license. Its inability to act, in the manner which we have discussed, is inherent in its very nature. *Its inability so to act can be remedied only by state legislation that expands its capacity.*" (Court's emphasis.) (R. 285.)

The state court then distinguished the instant case from the case of *First Iowa Hydroelectric Coop. v. Federal Power Commission* (1946), 328 U. S. 152, and concluded with the following:

> "In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*; it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington." (Court's emphasis.) (R. 286.)

Following Tacoma's petition for rehearing, the state supreme court pointed out that its opinion was necessarily limited to the present plan of construction and that it could not give an advisory opinion as to what other plan might be adopted or what the law would be if another plan were adopted, and said:

> "In our review of this case under the declaratory judgment statute (RCW 7.25.010), we are limited in our consideration by the plan of construction established by the ordinances of

the city of Tacoma, and the license the city of Tacoma received from the Federal power commission, as they appear in the record before us. It is not within the province of this court to give an advisory opinion as to what the law may be under a different plan of construction, which may be established by different ordinances or licenses.

"* * *

"We have already held that the question of the capacity of the plaintiff to acquire property of the state of Washington by eminent domain is within the jurisdiction of the court; and that the city of Tacoma has not been endowed with the statutory capacity to condemn state lands previously dedicated to a public use. Without this power, it cannot accomplish the plan set forth in the city ordinances before us; hence, for the reasons we have discussed herein, the judgment of the superior court is affirmed." (R. 370-371.)

The judgment enjoined spending any further sums on the project (R. 261). A stay was granted which allowed expenditures for, among other things:

"* * * the negotiation for possible acquisition or relocation of the Mossyrock Game Fish Hatchery of the State of Washington, expenses for assertion and maintenance of its legal and property rights. * * *" (R. 378.)

In Tacoma Taxpayers' response to the city's petition for rehearing, it is stated that Tacoma contemplated proceeding under an amended plan which would not require the destruction of the state fish hatchery and would, therefore, be within its capacity and power. (R. 346.)

In order to be able to advise the court whether any amendments have been applied for, counsel for the state wrote to counsel for the federal power commission under date of March 21, 1958, and received a reply under date of March 28, 1958. Copies of these letters are attached as Appendix B.

It would appear that no request for amendment has been made, and that the case is here based upon the original plan which requires the destruction of the state fish hatchery.

Tacoma's license appears in the record beginning at page 27 and is reported at 10 Federal Power Commission Reports 424-445. The licensee was required to commence construction of the project within two years from the effective date of the license, which was January 1, 1952 (R. 160).

This date was extended by order of the commission to December 31, 1955 (R. 160).

The Federal Power Act, Title 16 U. S. C. § 806, provides that the period for the commencement of construction under a license may be extended once but not longer than two additional years.

Tacoma has therefore had this maximum extension.

Article 28 of Tacoma's license requires the completion of the project within thirty-six months from commencement of construction (R. 45). Construction was started on the Mayfield dam on June 23, 1955 (R. 253).

SUMMARY OF ARGUMENT

The judgment of the state court below should be affirmed for reasons summarized as follows:

It is apparent that the project involved in this case cannot be completed by Tacoma within the time prescribed by its license which would require completion by June 23, 1958.

This is of special importance to respondent, Taxpayers of Tacoma, whose counsel will raise the point in a separate brief that the case is now moot.

Of the greatest importance to respondent, State of Washington, and all other states, is the maintaining of the states' sovereign right to fix the capacity and power of cities created for the purpose of discharging sovereign functions of state government; or more precisely, to protect the rights of a sovereign state from invasion by another sovereign without the consent and against the will of the state.

Amicus curiae, federal power commission, on page 16 of its brief, sets forth certain statements which should be considered in order to define clearly the decision of the state supreme court.

First, it is stated that the court recognized that its decision operated to prevent the construction of the federally-licensed project. Actually, the state supreme court pointed out that it dealt only with the existing license and the existing plan of construction. The project, of course, could be completed by the City of Tacoma under a new license or an amended

license, if that could be obtained, on a plan (considered by it) which would not destroy the state fish hatchery and would, therefore, be within its capacity and power to act, or it could be completed under a new license issued to a new applicant having capacity and power to act.

Again, *amicus curiae* states that the state fish hatchery could probably be adequately relocated. This assumption was taken from Tacoma's argument and is unfounded. The state game commission in the discharge of its duties found that it could not be relocated, and the state legislature, in refusing power to condemn, must also have found that it could not be relocated and was necessarily operated as a part of the state government.

The court will accept these administrative and legislative findings.

On page 17 of its brief, *amicus curiae* argues that the Federal Power Act should be construed so as to authorize condemnation of "state lands previously held for public use." This would imply that the state fish hatchery is not now being operated. Actually, the state game commission formally found that the state fish hatchery was being operated and had been operated since 1941, and that (1) no adequate alternate site could be found, (2) the operations were indispensable, and (3) the hatchery would be required for a period of years before any beneficial data could be obtained. (R. 175.)

The question before the state supreme court was, therefore, whether the City of Tacoma could condemn an instrumentality of the state government, which had been found to be indispensable and necessary as such, without having complied with the statutory steps for the acquisition of such property and in the absence of statutory authorization so to do.

The state supreme court held that Tacoma did not have that capacity and power. This decision of the state supreme court will be accepted by this court. 28 U. S. C. § 1652. Respondents will, therefore, not set forth in this brief the prior decisions of the Washington state supreme court which adequately support its judgment.

On June 21, 1955, notwithstanding the admonition of District Judge George H. Boldt dated June 15, 1955, as to the effect of the Federal Power Act, Tacoma, without having complied with statutory procedure and before an adjudication of its rights in the instant case, sold certain bonds and on June 22, 1955, awarded contracts for the construction of one of the dams.

The State of Washington immediately and on June 24, 1955, sought to enjoin this procedure, and in so doing pointed out that Tacoma had not claimed the right to condemn the state fish hatchery and did not have the right so to do.

Thus the question of the right to condemn the fish hatchery was raised by the state itself at the

earliest possible opportunity. That question could not have been presented to the federal power commission, which was without authority to decide it if it could have been presented, and was expressly excluded from consideration by the United States court of appeals for the ninth circuit in its review of the federal license in *State v. Federal Power Commission* (1953), 207 F. (2d) 391. It was properly considered and decided when raised in the instant case.

The Federal Power Act does not specifically authorize the condemnation of state property.

The federal power commission may in any event not authorize a branch of the state government to injure its creator, the state government, by destroying an instrumentality which the state government finds to be necessary, especially where the state legislature has expressly denied that right.

ARGUMENT

The real question was correctly decided by the state supreme court.

The state supreme court stated the question to be the capacity of Tacoma to condemn state lands necessarily devoted to governmental purposes.

The supreme court, of course, knew the question it was deciding. Tacoma knew the question it was deciding, and when the state supreme court decided it, took steps to seek the right to condemn the state fish hatchery by securing introduction in the state senate of Senate Bill 264 (App. A). Tacoma as peti-

tioner here, however, on page 4 of its brief, makes the unwarranted statement:

> "The real contest, however, is not over the hatchery, but the dams. * * * If the hatchery were being taken for some use not related to construction of a power dam, this case would not necessarily be here. * * *"

The state game commission found the hatchery to be indispensable and irreplaceable and would have opposed its destruction for any purpose. The state supreme court struck down every law which would tend to prevent the construction of a dam by a licensee with the capacity and power to act under the federal license.

It was Tacoma's lack of capacity and power to act on this particular plan, which would necessitate the destruction of the state fish hatchery, and that alone, which caused the courts of the state to enjoin the expenditure of funds.

Implicit in the state court's ruling is that petitioner, if licensed, could build a dam on a plan which would not necessitate the destruction of the state fish hatchery.

The question was one of capacity of the city, which is but a part of the state government, to injure the state government without consent of that government.

Let there be no misunderstanding. The ultimate issue in this case is not as stated by petitioner. It is the right of a sovereign state to control its in-

ternal affairs and regulate its own agencies of government.

In the case of *Driscoll v. Burlington-Bristol Bridge Co.* (1952), 8 N. J. 433, 86 A. (2d) 201, 229, the late Chief Justice Vanderbilt, speaking for a unanimous court, said:

> "* * * Quite obviously the Federal Government cannot grant a power to an agency of the State which the State itself has not seen fit to grant. * * *"

This court denied certiorari, 344 U. S. 838, and also denied a rehearing, 344 U. S. 888. Other cases to the same effect are *Burlington County Bridge Commission v. Meyner* (1955), 133 F. Supp. 214, and *Yadkin County v. City of High Point* (1940), 8 S. E. (2d) 470.

It is submitted that the ruling in the instant case should be accepted by this court as was the ruling in the New Jersey case just cited.

The state court, in deciding the instant case, held in essence:

(a) Tacoma, a part of the state government, without having acquired the right so to do, has undertaken a project which will destroy the state fish hatchery, which the state has found to be indispensable to its government.

(b) Tacoma claims the right to do this by eminent domain. This is a state question, our ruling on which will be accepted by the supreme court of the United States. We have consistently held and do now hold that since the applicable state statute does

not specifically grant the right to take or damage state property, that Tacoma has neither capacity nor power to destroy or damage the state fish hatchery.

(c) Tacoma argues that it has received the capacity and power to destroy the state fish hatchery from some federal source, particularly § 21 of the Federal Power Act.

(d) While such an argument violates every prior conception of the independence of the separate sovereignties, we proceed to see if there is a basis for such an argument and find that the Federal Power Act does not specifically mention state-owned property, and, therefore, does not purport to grant the right of eminent domain.

(e) In finding that there is no basis for Tacoma's argument, we are still concerned solely with the capacity of Tacoma, on which question our opinion will be accepted by the supreme court of the United States.

(f) Tacoma, not having capacity to destroy the state fish hatchery, must be enjoined from so doing, although it has the right to build the dam in such a way that the fish hatchery will not be damaged.

It is submitted that the court correctly confined its ruling to a state question, which this court will accept.

Congress simply did not (if it could) say to the State of Washington: "Your economy does not need the fish hatchery." Congress simply did not, in the Federal Power Act, authorize the federal power commission to make this statement, nor did it au-

thorize the federal power commission to authorize Tacoma to make this statement.

Congress simply did not attempt to authorize the federal power commission to tell the sovereign state: "Tacoma may build a dam 185 feet in height (R. 346) and destroy the fish hatchery, whereas state law would allow a dam of from 110 feet to 120 feet in height only, so that it will not destroy the state fish hatchery."

This court has uniformly held that Congress could not have done these things if it tried. Congress is prohibited by the constitution from exerting municipal sovereignty over the internal affairs of any state. See *Pollard v. Hagan* (1845), 3 How. 212.

Section 21 of the Federal Power Act, not purporting to grant the power of condemnation of state property specifically, does not confer the power to condemn state property already devoted to a conflicting public use.

Footnote 13 in the case of *U. S. v. Carmack* (1946), 329 U. S. 230, 243, points out the distinction between the unlimited sovereign power of eminent domain when exercised by the government on its own behalf and the limited powers of a public utility licensee, in the following words:

> "* * * A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign

powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. *In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority.* See *United States v. Jotham Bixby Co.*, 55 F. 2d 317, 319, affirmed *sub nom., C. M. Patten & Co. v. United States*, 61 F. 2d 970, decree vacated as moot, 289 U. S. 705; *In re Condemnations for Improvement of Rouge River*, 266 F. 105; *United States v. City of Tiffin*, 190 F. 279, 281." (Emphasis supplied.)

The state supreme court's ruling in the instant case is in accord.

In *Gibbons v. Ogden* (1824), 9 Wheat. 1, 195, this court said:

"* * * The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. * * *"

Had Congress intended to endow the City of Tacoma with the power to destroy the state fish hatchery, it would certainly have been an unauthorized exercise of sovereignty over the internal affairs of the State of Washington.

In *Tarble's Case* (1871), 13 Wall. 397, 406, this court said:

"* * * There are within the territorial

> limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. *Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other.* * * *" (Emphasis supplied.)

Tacoma is simply a part of the government of the State of Washington, and its powers are derived solely from the state, may be enlarged, abridged or entirely withdrawn by the state legislature at its pleasure. The absolute right to control exclusively their respective municipal corporations is reserved to the states under the tenth amendment to the United States constitution.

In *City of Trenton v. New Jersey* (1923), 262 U. S. 182, 187, the court said:

> "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will. See *Barnes v. District of Columbia*, 91 U. S. 540, 544, 545."

In *U. S. v. Council of Keokuk* (1867), 6 Wall. 514, 516, this court held that "it is quite clear" that all the rights, duties, and obligations of a municipal

corporation must be ascertained and defined by the laws of the state of its creation.

In *Chicago v. Fieldcrest Dairies* (1942), 316 U. S. 168, 172, which involved a dispute between the city and its sovereign creator, this court said:

> "* * * Furthermore, the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State. * * * The delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' (*Beal v. Missouri Pacific R. Co.*, 312 U. S. 45, 50) reemphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. * * *"

It is respectfully submitted that the determination of the state supreme court in the instant case should be treated as authoritative and controlling and should be affirmed.

ARGUMENT IN ANSWER TO PETITIONER AND AMICUS CURIAE

On page 24 of the brief filed on behalf of the federal power commission appears this sentence:

> "* * * We submit that an essential aspect of this power is that the United States may delegate it to agents of its own choosing, including state-created entities."

The state assumes that counsel did not mean to imply that the federal power commission deliberately canvassed the agencies, private and public, in the State of Washington in order to pick one which it chose as most proper to file an application. The

state also assumes that the federal power commission will do its duty when and if any applicant, including the City of Tacoma, might file any application for an original permit or amendment thereof.

It is quite evident also that in referring to "state-created entities" counsel for *amicus curiae* intended to limit their statement to those entities created under state laws, such as public utility districts, authorized by state law for the express purpose of constructing utilities, and did not intend even to imply that the federal power commission could delegate sovereign powers to the sovereign state or any city or commission through which the sovereign state exercises its governmental functions.

The cases cited by counsel for petitioner and counsel for *amicus curiae* do not sustain any such contention and do affirmatively hold that the power of the sovereign state may not be invaded.

Counsel for petitioner and counsel for *amicus curiae* imply or argue that the decision of the state supreme court on the capacity of the City of Tacoma under state law is wrong.

The state assumes that in the words of this court, such a decision is "authoritative" and will be accepted by this court. Should this court wish the question of state law briefed, the state will gladly furnish such a brief.

Chapter 374, Laws of Washington for 1955, is an example of how a city desiring to take property used by another agency of the state government

(state park commission) is granted authority so to do.

In that chapter the legislature of the State of Washington authorized the City of Spokane to condemn a portion of a state park for sewer disposal purposes, providing, however, that this authority could be exercised only "after notice and public hearing on the selection of said site."

In the instant case the legislature of the State of Washington has denied to the City of Tacoma at this time the power to take property being used by another branch of the state government, the state game commission.

It would unduly extend the length of this brief to analyze the numerous cases cited in the briefs of petitioner and *amicus curiae*. None of them affords any basis for the argument that the federal government or the federal power commission could interfere in the internal affairs of the sovereign state, let alone decide what branch of the state government should put what property of the state to what public use.

In none of the cases cited by petitioner or *amicus curiae* was a state-created entity, which had been expressly denied the power of injuring its creator, the state, involved.

The State of Washington, of course, does not deny that the United States has inherent sovereign power to condemn property necessary for its own

use, but counsel for petitioner and *amicus curiae* ignore the distinction between that power and the limited and strictly construed power of eminent domain enjoyed by public utilities, especially where that power is sought to be exercised to acquire property already devoted to a public use.

Counsel also ignore the basic fact that the sovereignty of the United States may not be transferred to the state, and the sovereignty of the state may not be transferred to the United States.

In *U. S. v. Jones* (1883), 109 U. S. 513, 518-519, this court said:

> "* * * The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom v. Patterson*, 98 U. S. 106, requires no constitutional recognition. * * * It is undoubtedly true that the power of appropriating private property to public uses vested in the general government—its right of eminent domain, * * * * cannot be transferred to a State any more than its other sovereign attributes; * * *"

It is equally certain and conclusive that the federal power of eminent domain cannot be conferred on a municipal corporation through which the state exercises its governmental functions. That would be conferring of a portion of the sovereignty of the United States on the state. For a stronger reason it is apparent that the right to injure the state government or another branch of the state government cannot be conferred, except by the sovereign state which necessarily regulates its own affairs.

In *Linder v. U. S.* (1925), 268 U. S. 5, 17-18, this court said:

> "* * * And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced. *McCulloch v. Maryland*, 4 Wheat. 316, 423; *License Tax Cases*, 5 Wall. 462; *United States v. DeWitt*, 9 Wall. 41; *Keller v. United States*, 213 U. S. 138; *Hammer v. Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20. In the light of these principles and not forgetting the familiar rule, that 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score,' the provisions of this statute must be interpreted and applied."

First Iowa Hydroelectric Coop. v. Federal Power Commission (1946), 328 U. S. 152, 178, points out the intent of Congress, in passing the Federal Power Act, to protect the constitutional rights of the states. The court therein said:

> "When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service. Section 9 (b) says that the Commission may wish to have 'satisfac-

> tory evidence' of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. The references made in § 9 (b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects. * * *"

At this point we take the liberty of recapitulating the holdings of this court in the decisions we have cited.

The power to regulate purely internal affairs has been retained by the states and never surrendered to the federal government; Congress cannot exercise municipal sovereignty over the internal affairs of a state; it is a question of local law what shall be the extent and character of the power of a state municipal corporation; such state municipal corporation is a part of the civil government of a state deriving its existence and power solely from its creator, the state legislature; such state municipal corporation cannot claim privileges or immunities under the federal constitution against its creator, the state.

Certainly it was not the intent of Congress, in enacting § 21 of the Federal Power Act (16 U.S.C. § 814), to confer on the City of Tacoma, a municipal corporation, a power to injure the state by damaging property already devoted to a governmental use

where that power has been expressly denied it by the state.

Grand River Dam v. Grand-Hydro (1948), 335 U. S. 359, 374, involved condemnation by a public utility, which right it must be noted the public utility enjoyed by virtue of state law. As to the impact of the Federal Power Act on this state right of condemnation, the court said:

> "* * * As to the question whether the Federal Power Act should be interpreted as actually superseding the state law of condemnation and as restricting the measure of valuation which lawfully may be used by the courts of Oklahoma in a condemnation action for the acquisition of land for power site purposes by an agency of that State, there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws."

In the instant case the state supreme court decided that Tacoma did not have capacity to accept a federal grant of right. In *Latinette v. City of St. Louis* (1912), 201 Fed. 676, 677, the courts of the parent state, Missouri, decided that the City of St. Louis had the capacity to accept a federal grant.

The state supreme court was correct in deciding that the question of the capacity of the City of Tacoma was not *res judicata* against the State of Washington. (R. 285.)

The circuit court of appeals for the ninth circuit, in reviewing the permit involved in this case, specifically held that questions of capacity might have

been inquired into by the federal power commission "as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." *State of Washington Department of Game v. Federal Power Commission* (1953), 207 F. (2d) 391, 396.

The circuit court of appeals for the ninth circuit specifically held that it did not "touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted." That court recognized that questions of capacity of the licensee were state questions, and by footnote 15a at the bottom of page 397 referred to the instant case, which was then pending before the supreme court of the State of Washington.

If the question of the capacity of the City of Tacoma could have been presented either to the federal power commission or to the court of appeals for the ninth circuit when it reviewed the license, it could not have been decided by either tribunal, and, therefore, the doctrine of *res judicata* could not apply.

However, the question of the capacity of the City of Tacoma could not have been presented to either tribunal for it had not arisen and did not arise until a later date. When the application for permit was before the federal power commission, that commission must have found that the state statutes provided an orderly way for the acquisition of state property. No one could or would assume that the City of Tacoma would at a later date abandon the statutory method of acquiring state property and start work

on the project without having acquired the right to damage the state fish hatchery. Then for the first time the question of Tacoma's capacity arose. It was promptly raised by the state and properly decided by the state court.

CONCLUSION

Petitioner, City of Tacoma, asked the state supreme court for a rehearing. (R. 313-344) In this petition for rehearing it set forth numerous situations which could exist and asked for an advisory opinion, which the state court could not grant, being confined to the status of the present license. (R. 370)

Since it has become impossible for petitioner to construct the project under the existing license, and since a new or amended license is now necessary, it would appear that appellant city should:

(a) Reapply to the state game commission to see if it is now possible to replace all or some of the state fish hatchery. (In August, 1955, the game commission found that there would be a necessity for the hatchery for a period of years before any beneficial data from previous experiments could be obtained.)

(b) Make a proper application to the federal power commission advising it for the first time of the facts.

It is respectfully submitted that the decision of the state supreme court should be affirmed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

PHILIP R. MEADE,
Assistant Attorney General,

Attorneys for Respondent Directors and State.

APPENDIX A

IN THE SENATE. By SENATORS JACKSON, DIXON and HAPPY.

Senate Bill No. 264

STATE OF WASHINGTON, THIRTY-FIFTH REGULAR SESSION.

Read first time February 8, 1957, ordered printed and referred to Committee on Public Utilities.

AN ACT

Authorizing the city of Tacoma to acquire certain state lands in the county of Lewis, state of Washington; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. The city of Tacoma is hereby authorized to acquire for use in connection with the construction and development of two dams on he Cowlitz river those state lands which are located within the county of Lewis, state of Washington and the project boundaries of the federal power commission license issued to the city of Tacoma, known as federal power commission project No. 2016, under the existing provisions of Washington state laws. Where no such provisions are provided then the compensation shall be determined under the provisions of RCW 8.12: *Provided*, That in connection with the acquisition of the department of game fish hatchery located at Mossyrock, Washington, the city of Tacoma shall first negotiate for a period of sixty days with the department of game for relocation or replacement of said hatchery upon terms mutually agreeable to the

department of game and the city of Tacoma; in the event that an agreement cannot be reached within that period of time, then the compensation to be paid for the acquisition of the portion of the hatchery necessary to project 2016, shall be determined under the provisions of RCW 8.12. The acquisition, relocation or replacement of said hatchery shall be in addition to the requirements for fish facilities set forth in article 31 of federal power commission license No. 2016.

SEC. 2. This act is necessary for the immediate preservation of the public peace, health and safety, and shall take effect immediately.

EXCERPTS FROM LEGISLATIVE RECORD, 1957 SESSION

"S. B. No. 264—By Senators Jackson, Dixon and Happy—An Act authorizing the city of Tacoma to acquire certain state lands in the county of Lewis, state of Washington; and declaring an emergency.

"Read first time February 8, referred to Committee on Public Utilities.

"Reported back February 20, with recommendation that Substitute S. B. No. 264 be substituted therefor and the substitute bill do pass majority; minority, do not pass.

"Sub. S. B. No. 264—By Public Utilities Committee—An Act authorizing any political subdivision of the state to acquire by purchase or condemnation certain state lands in Lewis county; making provision for replacement of fish hatchery facilities; and declaring an emergency.

"Read first time February 20, passed to Committee on Rules and Joint Rules for second reading.

"Read second time February 26.

"Passed to third reading.

"Read third time February 26, failed to pass; yeas, 19; nays, 27; absent, 0.

"On motion February 27, reconsidered and passed; yeas, 26; nays, 20.

"House Action

"Read first time February 28, referred to Committee on Fisheries.

"Reported back March 10, majority, do not pass; part, without recommendation; part, do pass.

"Passed to second reading.

"Read second time March 11, amended.

"Passed to third reading.

"Read third time March 12, failed to pass; yeas, 46; nays, 53; absent, 0.

"On motion March 12, reconsidered, failed to pass; yeas, 49; nays, 50; absent, 0."

APPENDIX B

March 21, 1958

Mr. Howard E. Wahrenbrock
Solicitor

Federal Power Commission
Washington 25, D. C.

Re: City of Tacoma v. Taxpayers, et al.
USSCt No. 509, October Term, 1957
A. G. File No. 15407

Dear Sir:

Reference is made to your letter of January 13, 1958, in which you courteously promised that you would furnish us with copies of such filings as we may need in connection with this case.

We are concerned with the status of the license held by the City of Tacoma, with particular refer-

ence to time limitations, and would appreciate it very much if you would furnish us with a copy or advise us of the contents of any order or ruling reflecting the status of this case in that particular.

Is the record in such shape that at the termination of this litigation the City of Tacoma could make application for an amendment of its license to conform with court rulings?

We are engaged in the preparation of respondents' brief and would appreciate it very much if you would favor us with an air mail reply. We will, of course, as you request, furnish you with copies of our brief when prepared, and on our part will be glad to furnish you with any information you may need.

Respectfully,

JOHN J. O'CONNELL
Attorney General,

/s/ E. P. DONNELLY
Assistant Attorney General,

EPD:dg
cc: Hon. J. Lee Rankin

FEDERAL POWER COMMISSION
WASHINGTON 25

Project No. 2016
City of Tacoma, Washington

March 28, 1958
AIR MAIL

Mr. E. P. Donnelly
Assistant Attorney General
State of Washington
Olympia, Washington

Dear Mr. Donnelly:

This will acknowledge receipt of your letter of March 21, 1958 requesting (1) the status of the license for Project No. 2016 of the City of Tacoma, and (2) asking whether the record is in such shape that the City could make application for an amendment of its license to conform with court rulings.

The Commission's opinion and order issuing license to the City of Tacoma are reported at 10 F.P.C. 424-445. The license for Project No. 2016 is still outstanding. However, as a result of the judgment of the Washington Supreme Court (49 Wn. 2d 781) the City is presently enjoined from spending any more money on the project.

It would appear that your second question could not be answered prior to termination of the litigation and until after such application for amendment is filed.

Very truly yours,

/s/ J. H. GUTRIDE
Secretary